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ABSTRACT

Based on an investigation of 207 of United States Supreme Court Justice William O. Douglas's opinions concerning the First Amendment, this paper argues for the existence of a rhetorical genre grounded in the jurisprudence known as "legal realism." The paper begins with an overview of the philosophy of legal realism that leads to a hypothetical operational definition of a legal realist rhetorical genre. This is followed by an examination of Douglas's actual opinions, using that definition as a theoretic guide. (FL)

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THE RHETORIC OF LEGAL REALISM:

WILLIAM O. DOUGLAS ON THE FIRST AMENDMENT

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THE RHETORIC OF LEGAL REALISM:
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When a justice has been characterized as "the supreme expositor from the bench of the philosophy of legal realism,"[1] small surprise should result if scholars look to that justice's opinions for an index of that particular strain of singularly American jurisprudence. Such has been true in the case of Justice William O. Douglas, about whom the statement was made.[2] However, until recently no one has investigated the rhetorical implications of such a characterization--is there a rhetoric of legal realism, and if so, what might it look like, what might be its generic constitutents, if, indeed, any exist? This paper reports an investigation[3] which led to the conclusion that the First Amendment opinions of Justice Douglas provide evidence for the possible existence of a rhetorical genre grounded in the jurisprudence known broadly as legal realism. This paper begins with an overview of the philosophy of legal realism which leads to a hypothetical operational definition of a legal realist rhetorical genre. An examination of actual opinions follows, using that definition as a theoretic guide.

Argument from Context: The Legal Realist Warrant

Addressing the New York State Bar Association in 1932, Justice Benjamin N. Cardozo claimed that "the most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists."[4] The realists to whom Cardozo referred were in fact both scholars and jurists.[5] The scholars providing seminal

philosophical impetus for the movement were William James and John Dewey, the fathers of pragmatism; the central jurist was Oliver Wendell Holmes, Jr., whose chief interpreter, Dean Roscoe Pound of the Harvard Law School, was primarily responsible for initiating the corollary to legal realism, "sociological jurisprudence." Wilfred E. Rumble thus argued that the realist movement was "best understood as an outgrowth of pragmatism, sociological jurisprudence, and the ideas of Mr. Justice Holmes."[6]

Although the term "sociological jurisprudence" is sometimes subsumed by the term "legal realism" and sometimes used synonomously, a clearer understanding of them reveals that the former refers to the study of legal institutions from a certain perspective, while the latter refers to a certain view of their operation. Ronald Dworkin explained the first:

> The emphasis on facts developed into what Roscoe Pound of Harvard called sociological jurisprudence; he meant the careful study of legal institutions as social processes, which treats a judge, for example, not as an oracle of doctrine, but as a man responding to various sorts of social and personal stimuli.[7]

A radical shift of focus was implied in this view, one which no longer viewed jurisprudence as a closed logical system but rather as functional institutions with social causes and effects to be reckoned with. Thus in an essay entitled "The Need for a Sociological Jurisprudence." Dean Pound called for "scientific apprehension of the relations of law to society and of the needs and interests and opinions of society today."[8]

The extension of this view made by the realists focused upon the operation of legal institutions and jural agents and was similarly radical in departing from traditional views of the judicial decision-making process. The impact of William James' psychology was most significant here.

Harry Jones suggested that the realist concept of legal thinking was best characterized as,

> . . . a shared legacy from Holmes--that judges, prosecutors, and practicing lawyers do not really think in syllogisms that substantive doctrine is not the essence of law, and that one who would know the ways of legal action must dig beneath the doctrines formally announced in judicial opinions down into the substrata of personal preference, empirical fact, and conflicting social interests.[9]

This view of the decision-making process received its most sophisticated development in the work of Jerome Frank, known both as "rule skepticism" and "fact-skepticism." The arguments judges use in announcing their decisions are better understood when viewed as Judge Frank viewed them:

> Rules, whether stated by judges or others, whether in statutes, opinions, or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them. . . . The law, therefore, consists of decisions, not of rules. If so, then, whenever a judge decides a case he is making law.[10]

Frank's explanation is clearly the progeny of Holmes' famous definition of law itself: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[11]

The important conclusion to be drawn from this discussion of judges as the centerpiece of legal realism is that their decisions provide the realist with criteria for determining the validity of laws. Whereas the proponents of natural law seek adherence to a moral order as the sine qua non of validity and the positivists insist upon a law's inclusion in a valid legal system, the realists' ultimate criterion is social utility. A legal rule, either in the form of a judge's decision or a

statute, would be required to meet two standards: (1) Does the rule aspire to desirable social goals? and, (2) Does the rule provide a rational basis for achieving those goals through the argument it presents or implies? Of course no realist would argue that predigree is unnecessary for a law, but such legitimation by virtue of harmony with the rules for rule-making would be seen as ancillary to its capacity for social engineering.

From these perspectives on legal realism can now be extracted the operational definition of a potential rhetorical genre of judicial opinion herein called Argument from Context: Arguments drawing warrants from legal realism, while possibly referring to statutory or case-law rules, in fact rely upon reference to social goals for support and typically stress the exigencies of the instant case or extra-judicial evidentiary materials.

The analog to Argument from Context found in rhetorical theory was explained by Richard Weaver as "Argument from Circumstance," which he characterized as "the nearest of all arguments to purest expediency. This argument merely reads the circumstances. . . and accepts them as coercive, or allows them to dictate the decision." Weaver went on to suggest that such "argument savors of urgency rather than of perspicacity; and it seems to be preferred by those who are easily impressed by esixting tangibles."[13]

The underlying teleological nature of legal realism (which is inherited from sociological jurisprudence), when viewed in tandem with Weaver's explanation of Argument from Circumstance, may provide clues with which to seek an "internal dynamic"[14] in judicial opinions in order to determine whether such elements form a rhetorical genre.

Results

An examination of 207 of William O. Douglas' first amendment opinions found that seventy-two appeared to rely predominantly upon the tenets of legal realism as operationalized in this study. A closer analysis revealed three distinct sub-species of the "Argument from Context." They were characterized as the "sociocentric," the "relativistic," and the "exigential" forms of the "Argument from Context."

Argument from Context: The Sociocentric Sub-Species

Sociocentric Arguments from Context were decided predominantly by reference to social goals and/or social effects. These arguments came closest to typifying a sociological jurisprudence--the view that legal institutions are best understood as being socially embedded, reacting to and impacting upon the society around them. This court-centered view features judges as its focal point and expects them to argue from a desire to achieve social goals or an intent to produce or prevent social effects. Douglas' first amendment opinions provide a rich inventory of such rhetoric.

The cold war mentality of the 1950's gave rise to a plethora of governmental committees charged with insuring the loyalty of public employees. Tenney v. Bandhove came to the court in 1951 from California, testing the question of whether the privileges and immunities afforded state legislators extended to the investigative function of committees. The majority held that the first amendment granted immunity for such functions, and Douglas dissented. He did not entirely reject the need for immunity, but was clearly motivated in this argument by concern with the social pressures

which spawned such committees and by dismay with the social effects they were cabable of producing:

> . . . we are apparently holding today that the action of those committees have no limits in the eyes of the law. May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens and issue pronouncements as devastating as any bill of attainder?[15]

What emerged rather clearly in Douglas' Tenney dissent was the sociological view of legal institutions, in this case both the legislatures and of courts. He recognized the social impact of the investigative arm of the state legislature, and sought to curb its undesirable effects with the judiciary's power of review.

Schools and teachers were a popular target in the 1950's for those wanting to safeguard Americanism. To this end, New York passed the "Feinberg Law," aimed at purging "subversive persons from the public school system." The Supreme Court sustained the law, again Douglas dissented, this time producing one of the more stirring opinions of his career:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. A 'party line' --as dangerous as the 'party line' of the Communists lays hold. It is the 'party line' of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the

> classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become servile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[16]

When de Tocqueville suggested in the nineteenth century that virtually every problem in American life eventually found its way to the Supreme Court, even he probably would not have guessed that his observation would hold true for the most intimate problems of the bedroom. Yet that is precisely what Poe v. Ullman brought to the Court in 1961, the right of a husband and wife to receive from their doctor information regarding birth control. In this case, the Court sustained lower court rulings which Douglas's dissent argued would have the effect of "sealing the lips of a doctor because he desires to observe the law, obnoxious as the law may be."[17] Such a result, he argued, culminated in social effects which were unacceptable:

> The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility.[18]

What is evident in these two cases is Douglas' reliance upon the sociocentric Argument from Context in order to alleviate or produce certain social effects; in one case in the area of state government, in the other in the area of medicine. Six years later his own profession was drawn in by this argument.

The emergence of poverty law centers in the 1960's was among the more pragmatic results of the civil rights struggle. But when Hackin v. Arizona came before the Supreme Court in 1967 testing the extent to which the indigent were entitled to counsel, the Court, per curiam, dismissed the

appeal for want of a federal question. Douglas dissented. In two ways his opinion in Hackin illustrated how a judicial argument may find its warrant [e philosophy of legal realism. First, he stressed the interplay between the legal profession and the society it serves:

> . . . to millions of Americans who are indigent and ignorant--these rights [that lawsuits are protected speech under the first amendment, see N.A.A.C.P. v Button, 371 U.S. 415 (1963)] are meaningless. They are helpless to assert their rights under the law without assistance. They suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments and endure domestic strife without hope of the legal remedies of divorce, maintenance, or child custody decrees.[19]

Second, in the style of the "Brandeis Brief"[20] named for his philosophical and chronological progenitor, Douglas footnoted the above passage with citations, not to legal precedents, but to ten major sociological studies of poverty and the law. Such reliance upon extra-judicial sources is a product of the twentieth century almost exclusively, and of legal realists typically. The sociocentric Argument from Context may have reached its zenith in Chief Justice Earl Warren's majority opinion in Brown v. Board of Education,[21] an opinion which relied heavily upon studies by the prominent black social psychologist, Dr. Kenneth Clark.[22] Douglas, however, was never more forceful than when making such arguments, and diverse areas of American society came under his scrutiny as he relied upon them. Two final examples should suffice.

In 1972 Healey v. James brought to the Court the question of whether a state college president could constitutionally deny recognition to a proposed chapter of Students for a Democratic Society (SDS) on his campus.

Justice Powell's majority opinion ruled that he could not, and Douglas concurred. But the warrant from which Douglas argued was not rule-based, but sociocentric, stressing goals to which the good society should aspire:

> The present case is miniscule in the events of the '60's and '70's. But the fact that it has come here for ultimate resolution indicates the sickness of our academic world, measured by First Amendment standards. Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.[23]

No doubt the single most important Supreme Court case affecting mass media in America was Red Lion Broadcasting Co. v. FCC, which gave constitutional sanction to the Fairness Doctrine.[24] Much to the dismay of many students of the Court, Douglas' health prevented him from taking part in the Red Lion decision. However, four years later he had his opportunity to speak to the wisdom of the Fairness Doctrine and in doing so he authored what was his last great first amendment opinion. The case was Columbia Broadcasting System v. Democratic National Committee, and in it the Court ruled that the Fairness Doctrine did not require individual licensees to sell commercial time for the purpose of editorial announcements. Two groups, the DNC and the Business Executives Move for Peace had taken a Washington radio station, WTOP, to court in their attempt to broadcast anti-war editorials. The Court of Appeals ruled in favor of the two groups, invoking the Fairness Doctrine. But the Supreme Court, by a 7-2 vote, reversed, Chief Justice Burger's opinion saying, in part, "editing is

what editors are for." Douglas took this opportunity to say what he had been unable to say in Red Lion. Concurring with the majority, he argued from the sociocentric Argument from Context that governmental intrusion into the television industry would provoke undesirable effects:

> Red Lion Broadcasting Co. v. FCC, . . . in a carefully written opinion that was built upon predecessor cases, put TV and radio under a different regime [from newspapers]. I did not participate in that decision, and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV and radio in order to serve its sordid or benevolent ends. In 1973--as in other years--there is clamoring to make TV and radio emit messages that console certain groups.[25]

The prospect of government compelled speech--forcing broadcasters to "emit messages" --was one Douglas feared and one which remains at the center of debate on the social utility of the Fairness Doctrine.

Argument from Context: The Relativistic Sub-Species

A second sub-species of the Argument from Context finds its roots in the rule and fact skepticism of Jerome Frank.[26] Recognizing the inescapable variability of human judgment, the skeptics argued that the law "consists of decisions, not of rules,"[27] with the upshot being that there are some areas of conduct in which courts should not be making decisions. Thus, the sub-species of argument based upon this aspect of legal realism may be called the "Relativistic" Argument from Context. Douglas' opinions in the area of obscenity and pornography relied heavily upon this type of argument, one which basically denies the possibility of making aesthetic judgments capable of winning universal support, and

therefore concludes that such decisions are no business of judges and juries.

An early statement of this position came in Douglas' opinion for the Court in Hannegan v. Esquire in 1946. Postmaster General Hannegan had revoked the second class mailing privileges of Esquire magazine upon a finding that the periodical failed to meet one condition of Section 14 of the Classification Act of 1879, stipulating that publications entitled to the lower rate must contain "information of a public character" and thus contribute to the public good. The Court vacated Postmaster General Hannegan's order, and Douglas argued from the relativistic Argument from Context that in passing the legislation Congress never intended,

> . . . that each applicant for the second class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accomodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There would doubtless be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic [idea] implicit in the requirements of the fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to me to be trash may have for others fleeting or even enduring values.[28]

The 1957 term of the Supreme Court saw a number of obscenity cases from various parts of the country. In Kingsley Books v. Brown Douglas posted a dissent which foreshadowed his dissent sixteen years later in Miller v. California. The epistemological and aesthetic relativism

characteristic of legal realism was clearly stated here as Douglas observed that,

> Juries or judges may differ in their opinions, community by community, case by case. . . . Free speech is not to be regulated like diseased cattle or impure butter. The audience (in this case the judge or jury) that hissed yesterday may applaud today, even for the same performance.[29]

In Ginzburg v. United States in 1966 the Court continued the process begun nine years earlier in Roth of attempting to formulate objective tests for the judicial determination of obscenity. Here Ralph Ginzburg was charged with obscenity as manifested in three of his publications: Eros and Liason magazines, and a monograph entitled The Housewife's Handbook on Selective Promiscuity. The final aspect of the "Roth Test Revised" was added in this case, the so-called "pandering" element. The Court reached its finding of obscenity, in part at least, because Ginzburg, who had attempted to obtain mailing privileges in the towns of Blue Ball and Intercourse, Pennsylvania and Middlesex, New Jersey, was found guilty of possessing "the leer of the sensualist." As Professor Emerson pointed out, Douglas' dissent "stressed the elusiveness of all the standards which have been proposed."[30] The opinion, perhaps the clearest example of the Relativistic Argument from Context, began with a citation from Jerome Frank's circuit court opinion in the Roth case and then proceeded to posit a number of unanswerable questions typical of rule and fact skepticism:

> How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have some 'social importance' in giving that minority an opportunity to express itself rather than to repress its inner desires. . . .How can we know that this expression may not prevent antisocial conduct.?[31]

Argument from Context: The Exigential Sub-Species

A third sub-species of the Argument from Context emerged in Douglas' first amendment opinions. This type might be called the "exigential," for it allows the decision to be dictated primarily by the pecularities of the instant case. Karl Llewellyn's article, "Some Realism About Realism" in the 1922 Harvard Law Review provided insight into this type of argument when he wrote that the realists,

> . . . want law to deal . . . with things, with people with tangibles, with definite tangibles, and with observable relations between tangibles--not with words alone; when law deals with words, they want words to represent tangibles which can be got at beneath words and observable relations between those tangibles.[32]

This, of course, was not to suggest that the legal realist wanted law to become a disconnected sequence of ad hoc decisions, with no memory of precedent cases and no reference to generalized legal rules. It simply meant that on occasion, the "tangibles" would provide the point of departure from whence the judge reasons to the rule, instead of vice versa, and as Douglas pointed out in E.P.A. v. Mink, "the starting point of a decision usually indicates the result."[33] Again, this argument type is differentiated from rule-based arguments in terms of rhetorical emphasis, not on the basis of the total absence of reference to cases or statutes.

Douglas invoked this argument form in 1947 in the case of Craig v. Harney when he pointed out that often the Supreme Court is required to make "an independent examination of the facts."[34] The facts requiring such an independent examination in this case related to a series of editorials rather vigorously attacking a judge in a local trial. The papers were charged with contempt, were convicted, and then appealed to the Supreme

Court where, through Douglas' majority opinion, their convictions were reversed. Looking to the content of the editorials and their probable impact upon the judge's impartiality, Douglas wrote:

> . . . it takes more imagination than we possess to find in this sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. . . . We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time.[35]

The rule to which this analysis of the "tangibles" was intended to infer was the "clear and present danger test," but this argument was distinct from the Argument from Rule for it clearly emphasized the facts of the case and not the rule itself.

A similar result was reached in Douglas' oft-quoted dissent in Dennis v. United States, one of the leading Communist conspiracy cases of the 1950's. In Dennis, the Court sustained the convictions of twelve members of the Central Committee of the Communist Party of the United States for violating the membership clause of the Smith Act. Addressing himself to the notion of advocacy of abstract doctrine, Douglas asserted that "how it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. . . . in America they [Communists] are miserable merchants of unwanted ideas; their wares remain unsold."[36] In the absence of evidence on the record that such advocacy would in fact result in the overthrow of our system of government, Douglas argued, the first amendment afforded protection to the defendants. Thus, the Exigential Argument from Context may be seen to reply upon factual evidence, or the lack of it, when such evidence is deemed relevant

to the decision. Reference to a legal rule is often the result of such an argument, but is not the basis of it.

A final example of how Douglas argued from the exigencies of the instant case to a rule, with emphasis upon the former, also arose in the context of what Emerson called "the post-war hysteria known as McCarthyism."[37] The Court denied certiorari in Black v. Cutter Labs, a case involving the dismissal of an employee on the grounds that she was a security risk. Douglas argued that the case should be heard, and his opinion relied predominantly upon the Exigential Argument from Context:

> Cutter Laboratories is an important pharmaceutical factory. It may need special protection. It may need to establish safeguards against sabotage and adulteration. It may need special screening of its employees. But there is not a word in the present record indicating that it needs protection against Doris Walker. She has no criminal record, she is guilty of no adulteration, no act of sabotage. The factory in question has not been plagued with any such problem. It is only the fear that Doris Walker might at a future time engage in sabotage that is made the excuse for his discharge. I do not think that we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear. The blunt truth is that Doris Walker is not discharged for misconduct but either because of her legitimate labor activities or because of her political ideology or belief. Belief cannot be penalized consistently with the First Amendment.[38]

The dominant theme of this opinion was thus an analysis of the factual situation--the tangibles--which then led to a generalized rule, in this case the first Amendment.

An inductive internal dynamic thus typifies the Argument from Context in each of its sub-species. In the first sub-species, the sociocentric, an inductive progression underlies the argument--specific social situations, social contexts, social goals as manisfested in specific cases, lead to but do not rely upon, generalizations taking the form of common law, statutory, or constitutional rules. The relativistic sub-species of the Argument from Context also uses inductive processes, but with a different result. Here the judge-rhetor reads the contrariety of situations, the aesthetic and/or epistemological variability inherent in value judgments, and reasons to the rule that there can be no rule to accomodate such disparate situations. Finally, the exigential Argument from Context is based upon factual phenomena and views them as controlling. The judge proceeds from such facts to a rule, and that sequence of the argument distinguishes it from positivistic (i.e., syllogistic) arguments.

Rhetorical Genres in Judicial Opinion

That rhetorical genres exist in judicial opinion in the form of argument from Context seems evident. The first qualification of this claim, of course, flows from the limitations of case study. To infer from one justice, particularly one like Douglas, to all others is questionable. But two central issues must be kept in mind. First, case studies are not designed to provide final answers, only initial clues. The clues here are strong. Second, although Douglas is clearly an unrepresentative case, the same can be said of any justice who ever served--there is no "typical" Supreme Court justice. But they do all serve the same Supreme Court--they all serve an instutition and a legal system with certain endemic

characteristics and to that extent any justice, no matter how atypical he may appear, can provide some insight into the nature of the system he serves.

A second general qualification of the generic claim made here has to do with the nature of the exigencies to which Douglas was responding. All the evidence offered herein is based upon rhetorical responses to first amendment exigencies. One aspect of this disclaimer is that these issues were perhaps more personally salient to Douglas than to other justices, a consideration which could color the results of an analysis such as this. Another aspect of this disclaimer is that despite the fact that an analysis of only first amendment opinions achieves more precision than other studies have, it is still quite a broad brush with which to paint. First amendment law divides into speech, press, assembly, establishment, exercise, and petition clauses, each of which may possibly inspire different responses because of the vastly different exigencies which may typify them. The present study made no distinction on the basis of these different areas of law. However, there is a thread running through these diverse elements of the first amendment which justifies treating them together. The "personal fulfillment" dimension of the first amendment, as Emerson put it,[39] cuts across all these areas of law in Douglas' approach. Whether the instant case arose from controversies involving sidewalk oratory, religious pamphleteering, or labor union organizing, Douglas saw the situations as kin: They all represented individual citizens striving through expression to gain a measure of dignity, to improve their lives, to spread the truth as they saw it. Thus, although the first amendment's

penumbra covers a variety of rights, we are warranted in treating them as a sufficiently similar class of exigencies for purposes of genre criticism.

One central implication of the existence of rhetorical genres based upon legal philosophy inhering in judicial opinion seems apparent: Jurisprudence should not be a means of labeling a justice, but rather a means of classifying his arguments. Just because Douglas issued numerous opinions aimed at engineering social goals, that alone does not place him in the camp of the legal realists.[10] Philosophical variations in judicial opinions are best understood as variant rhetorical responses to variant legal situations--a jurisprudential set of topoi--to which the judge-rhetor may refer. There are "the available means of persuasion in any given case," not a mold from which the judge may never escape. By understanding jurisprudence in a rhetorical light, we probably can better evaluate the judge, his arguments, and the legal philosophy as well.

FOOTNOTES

[1]Michael I. Sovern, "Mr. Justice Douglas," Columbia Law Review 74 (1974), p. 234.

[2]See for example, Gerhard Casper, "The Liberal Faith: Some Observations on the Legal Philosophy of Mr. Justice William O. Douglas," Federal Bar Journal 22 (1962), pp. 179-194; Leon D. Esptein, "Justice Douglas and Civil Liberties," Wisconsin Law Journal 125 (1951), pp. 125-157; Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process' Formula," U.C.L.A. Law Review 16 (1969), pp. 716-750; L.A. Powe, Jr., "Evolution to Absolutism: Justice Douglas and the First Amendment," Columbia Law Review 74 (1974), pp. 371-411; Dorothy Bruckton James, "Judicial Philosophy and Accession to the Court: The Cases of Justices Jackson and Douglas," Unpublished Ph.D. Dissertation, Columbia University, 1966; Roy Lee Meek, "Justices Douglas and Black: Political Liberalism and Judicial Activism," Unpublished Ph.D. Dissertation, University of Oregon, 1964; and Solomon Resnik, "Black and Douglas: Variations in Dissent," Unpublished Ph.D. Dissertation, New School for Social Research, 1970.

[3]This paper is based on the author's doctoral dissertation, directed by Dr. Paul Barefield, "Justice William O. Douglas on the First Amendment: Rhetorical Genres in Judicial Opinions," Unpublished Ph.D. Dissertation, University of Oklahoma, 1979.

[4]"Jurisprudence," in Margaret E. Hall, ed., Selected Writings of Benjamin Nathan Cardozo (New York: Falon Publications, 1947), p. 10.

[5]The term draws in a variety of writers. Harry Jones explains that he "shall be using the tent term 'legal realist' in a sense broad enough to accomodate the behavioral focus of Karl Llewellyn, the fact-skepticism of Jerome Frank, the insitutional empiricism of Underhill Moore and the logical pragmatism of Edwin Patterson." (Harry W. Jones, "Legal Realism and Natural Law," in M.P. Golding, ed., The Nature of Law (New York: Random House, 1966), p. 263.) Ronald Dworkin refers to "the powerful intellectual movement called 'legal realism,'" and associates with it the names of John Chipman Gray, Oliver Wendell Holmes, Jr., Jerome Frank, Karl Llewellyn, Roscoe Pound, and Morris and Felix Cohen (Taking Rights Seriously, (London: Duckworth, 1977), pp. 3-4). Neither writer would claim comprehensiveness for his list; perhaps the work of Wilfried E. Rumble, Jr., American Legal Realism: Skepticism, Reform, and the Judicial Process (Ithaca, NY: Cornell University Press, 1969) does the best job of identifying both the representative contributors and significant ideas of the realist tradition.

[6]Rumble, p. 46.

[7]Dworkin, Taking Rights Seriously, p. 4.

[9]Green Bag XIX (1907), pp. 610-600, quoted in Rumble, p. 9.

[9]Jones, p. 263.

[10]Jerome Frank, Law and the Modern Mind (New York: Anchor Books, 1963), pp. 137-138.

[11]Holmes, "The Path of the Law," Harvard Law Review 10 (1897), pp. 457-468, quoted in Golding, The Nature of Law, p. 179.

[12]In an important article in The Journal of Philosophy Ronald Dworkin detailed exactly what forces are at work when a judge bases his decision upon factors other than statute or precedent. Pointing out that the belief that judges always "find law" is a tenet of the outmoded school of thought called "formalism" or "mechanical jurisprudence," Dworkin explained that "the position presently in vogue insists rather that there are two sources of judicial decision: rule and discretion." Dworkin, who insisted that the exercise of discretion is not "an occasional misfiring but a characteristic feature of the legal process," suggested that there are basically three types of standards available to the judge as legitimate inventional options when arguing from sources other than statute or precedent:

> First, there are standards, like "No man shall profit by his own wrong' and 'Infants are the wards of the law,' which are like textbook rules in that they have already been used in a variety of cases as good reasons for decision, and a judge will determine the weight and scope of such standards by awareness of these cases.
>
> Second, certain institutions of any community are competent to declare standards on its behalf. For us, today, such institutions include legislatures, executive officers, and administrative agencies, and the judiciary itself, in the sense that a 'new' standard may be shown to represent a proper summary of the resolution of other standards achieved in other cases.
>
> [Third], judgments of the community at large or some identifiable segment thereof. The court refers to such judgments when it rejects a particular result or rule as unjust, as well as when it more explicitly invokes the ideals of the society. . . . This discussion treads on the famous controversy. . . about the relation of law and morals. On some occasions, in some kinds of cases, moral principles accepted as standards within the community will figure as good reasons for a legal decision, just as, on other occasions, in other kinds of cases, will standards otherwise established.

(Ronald Dworkin, "Judicial Discretion," The Journal of Philosophy 60 (1963), pp. 624-638.

In Dworkin's argument lies the key to understanding Jones' suggestion that close affinities exist between natural law and legal realism. The point at which they intersect is the point at which they depart from an argument from rule in order to make discretionary decisions and thereby fill the so-called "gaps" in the positive law. The realist adopts a more empirical orientation, the natural lawyer tends to the idealistic. Arthur Goodhart explained the empirical basis of such a realist orientation:

> It is by his choice of material facts that the judge creates law. A congeries of facts is presented to him; he chooses those which he considers material ones. . . . His conclusion is based on the material facts as he sees them, and we cannot add or subtract from them by proving that other facts existed in the case.

(Arthur Goodhart, "Determining the Ratio Decidendi of a Case," Yale Law Journal XL (December 1930), p. 169).

Abraham L. Davis provided numerous examples of such fact selection in his important work, The United States Supreme Court and the Uses of Social Science Data (New York: MSS Information Corporation, 1973). A notable case was the apparent influence upon Chief Justice Earl Warren's Brown opinion of extensive social psychological evidence relating the harms of racial segretation.

[13]Some legal theorists of a positivistic bent would agree with Weaver's suggestion that those adopting this form of argument are less than perspicacious, particularly as regards analysis of statutory and/or case-law constraints. However, that misses the point of American legal realism; it was astute social perspicacity that sired the urgency of their arguments in favor of making precedents rather than following them.

[14]Space obviously precludes detailed extrapolation of genre theory presently. Let it suffice to say that the present study adopted the guidelines and principles of Campbell and Jamieson in Form and Genre: Shaping Rhetorical Action (Falls Church, VA: The Speech Communication Association, 1978). They explained just what the critic seeks when pursuing, in Northrop Frye's word, "clarification." The aim is to find the "internal dynamic" which binds together constellations of substantive and stylistic forms. Thus, when the critic purports to have found a rhetorical genre, the claim is being made that "a group of discourses has a synthetic core in which certain significant rhetorical elements, e.g., a system of belief, lines of argument, stylistic choices, and the perception of the situation, are fused into and indivisible whole." (p. 21)

[15]341 U.S. 367 (1951) at 382.

[16]Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952) at 510.

[17]367 U.S. 497 (1961) at 514-515.

[18]367 U.S. 497 (1961) at 518. This case was overruled by Griswold v. Connecticut, 381 U.S. 479 (1965), a case in which Douglas wrote the Court's opinion and cited this dissent for support.

[19]389 U.S. 143 (1967) at 145.

[20]The "Brandeis Brief" is a term of describing an approach to legal argumentation first introduced by Attorney Louis D. Brandeis when he argued Muller v. Oregon, 208 U.S. 412 (1980) before the Supreme Court. Johnson wrote that the "Brandeis Brief" introduced a "new technique in the weighing of constitutional issues. This occured when Mr. Louis D. Brandeis handed the Court. . . his famous brief, three pages of which were devoted to a statement of the constitutional principles involved and 113 pages of which were devoted to the presentation of facts and statistics, backed by scientific authorities, to show the evil effects of too long hours on women, ' the mothers of the race.'" Johnson, Social Planning Under the Constitution, 2 Selected Essays (1938) 131, 145. Quoted in Edward L. Barrett, Jr., and Paul W. Bruton, eds., Constitutional Law: Cases and Materials, (Mineola, New York: The Foundation Press, Inc., 1973) p. 700.

[21]347 U.S. 483 (1954).

[22]See generally: Archibald Cox, The Warren Court: Constitutional Decisions as an Instrument of Social Reform (Cambridge: Harvard University Press, 1968): Abraham Davis, The United States Supreme Court and the Uses of Social Science Data (New York: MSS Information Service, 1973); and Paul L. Rosen, The Supreme Court and Social Science (Urbana: University of Illinois Press, 1972).

[23]408 U.S. 169 (1972) at 107.

[24]395 U.S. 367 (1969). For copious background information on the Red Lion case and other significant legal developments in broadcast regulation, see Fred W. Friendly's excellent work, The Good Guys, The Bad Guys and the First Amendment (New York: Random House, 1975).

[25]412 U.S. 94 (1973) at 154-155.

[26]See Jerome Frank, Law and the Modern Mind (New York: Anchor Books, 1963) originally published by Bretano's 1930.

[27]Ibid., p. 138.

[28]327 U.S. 157 (1946) at 157-158.

[29]354 U.S. 436 (1957) at 443.

[30]Thomas I. Emerson, David Haber, and Norman Dorsen, Political and Civil Rights in the United States, Student Edition, Vol. I (Boston: Little, Brown and Company, 1967), p. 656.

[31]383 U.S. 463 (1966) at 491.

[32]Karl Llewellyn, "Some Realism About Realism," Harvard Law Review 44 (1922), p. 1223

[33]410 U.S. 73 (1973) at 105.

[34]331 U.S. 367 (1947) at 373.

[35]Ibid., at 375-376.

[36]341 U.S. 494 (1951) at 588-589.

[37]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970) p. 112.

[38]351 U.S. 292 (1956) at 302-303.

[39]Thomas I. Emerson, "Justice Douglas' Contribution to the Law: The First Amendment," Columbia Law Review 74 (1974), p. 356.

In fact, the study upon which this essay is based found quite the contrary to be true. In his 207 first amendment opinions, Douglas relied most often (117 or 56.5% of the cases) upon arguments grounded in legal positivism. The 72 legal realist opinions accounted for 34.8% of his first amendment opinions, while natural law arguments numbered 18 or 8.7%.